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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA

v.

KURT CARPENTINO

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17-cr-157-01-PB

June 8, 2018

3:40 a.m.

TRANSCRIPT OF CHAMBERS CONFERENCE  
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For the Government: Seth R. Aframe, AUSA  
Georgiana L. Konesky, AUSA  
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For the Defendant: Jonathan R. Saxe, AFPD  
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Concord, NH 03301

Court Reporter: Sandra L. Bailey, LCR, CM, CRR  
Official Court Reporter  
United States District Court  
55 Pleasant Street  
Concord, NH 03301  
(603)225-1454

C H A M B E R S

THE COURT: Okay, so, I have not edited these. I will edit them over the weekend. I've been trying to develop them on the fly as well as responding to legal arguments being thrown at me at the last minute. So I reserve the right to make changes to them on my own initiative as I edit them over the weekend.

What I want to do now is I'll tell you that the bulk of this instruction is boilerplate that I give in virtually every case. So I don't want to spend time with you on these now. Instead, I intend to have you turn to page nine and to go over the core elements with you and then I will ask you to email to the clerk by 5 p.m. tomorrow any additional objections or requests that you have.

If you object to an instruction I propose to give, I want you to propose the language you believe I should provide in substitution for the language that you object to unless you conclude that there is no language that should be given. You should specify what language you're objecting to and you should propose an alternative if you have an alternative.

If I've omitted something you proposed that I give, you should provide a full copy of what you propose I give as well as any authority you have to support it.

1 I'll come in on Sunday and edit it up and I will meet  
2 with you Monday morning before closing arguments to tell  
3 you finally what I propose to give.

4 Does everybody understand what I want to do?

5 MS. GRAHAM: Yes.

6 MR. SAXE: Yes.

7 THE COURT: Okay. So let's start on page  
8 nine, causing the transportation of a minor with intent  
9 to engage in sexual activity:

10 The defendant has been charged with a  
11 violation of 18 USC Section 2423(a) which makes it a  
12 crime for a person to knowingly transport an individual  
13 who has not attained the age of 18 years in interstate  
14 commerce with the intention that the individual engage  
15 in any sexual activity for which any person can be  
16 charged with a criminal offense.

17 That's just my paraphrasing of the statute.  
18 Does anybody have any problem with that? Again, you can  
19 make a final decision as you review these more carefully  
20 overnight, but it helps if you tell me now if you see a  
21 problem, okay?

22 Essential elements of the offense. I think  
23 there are three:

24 In order for the defendant to be found guilty  
25 of this charge, United States must prove each of the

1 following elements beyond a reasonable doubt:

2 First, that the defendant knowingly  
3 transported Mackenzie Harvey in interstate commerce.  
4 Second, at the time of the transportation Harvey was  
5 under the age of 18 years. And third, at the time of  
6 the transportation the defendant intended that Harvey  
7 would engage in sexual activity for which any person  
8 could be prosecuted under Vermont law.

9 Any problem with the way I've stated the  
10 essential elements?

11 MR. SAXE: Well, that's what the statute says,  
12 but I did research this and there wasn't an instruction  
13 in the First Circuit that I could find, so, there's the  
14 issue of if they could just be prosecuted for it, is  
15 that enough, or does the person have to have -- well, I  
16 have to look into it. In my mind it's complicated.

17 THE COURT: Okay, I'm not sure where you're  
18 going.

19 MR. SAXE: Neither am I. That's why I'm not  
20 going to --

21 THE COURT: Okay, I won't speculate, then,  
22 until I know. I have had enough trouble understanding  
23 arguments that you made in this case, Mr. Saxe, so I  
24 will let you try to present it in writing to me  
25 overnight, okay?

1 Does anybody have any other concerns that leap  
2 out at them as they read through this statement? As I  
3 said, I revised slightly the government's proposal  
4 because I feel the way I have it more accurately  
5 captures the offense and I was concerned that as stated  
6 by the government that it might mislead the jury into  
7 thinking that unless Harvey had engaged in criminal acts  
8 herself or it was an intention that Harvey engage in  
9 criminal acts, that the defendant couldn't be convicted,  
10 and I think the statute deals with that with the any  
11 person language.

12 Transportation in interstate commerce:

13 I instruct you that a person is transported in  
14 interstate commerce if the person is transported between  
15 New Hampshire and Vermont.

16 Anybody have a problem with that? Seems  
17 pretty straightforward. Okay.

18 Let me explain how I've dealt with the issue I  
19 raised with you during the trial. As I looked at the  
20 statute and tried to parse it, I was concerned that --  
21 it was unclear to me as to whether in order for there to  
22 be criminal activity there must be both sexual activity  
23 as that term is defined in federal law and a Vermont law  
24 violation, and so I have set them out and it seems  
25 redundant because the elements are virtually identical.

1 There's a little, one little clause phrasing difference,  
2 but I don't think it's material here, but nevertheless,  
3 to be sure that I've captured any argument about how the  
4 statute could be construed I decided to put both in.  
5 So, sexual activity is drawn from the definition  
6 verbatim in the statute of sexual activity. And I  
7 state:

8 Sexual activity for purposes of this case is  
9 contact between the penis and the vulva that involves  
10 penetration however slight, contact between the mouth  
11 and the penis, and contact between the mouth and the  
12 vulva.

13 That's, I didn't use the entire definition  
14 because I didn't hear testimony about other types of  
15 contact. So that's verbatim, those portions of the  
16 statute that appeared to relate to the case based on the  
17 evidence in the case. I did not hear the word vulva, so  
18 I'm hoping that the jury can understand what the vulva  
19 is, but we'll have to see. I chose to use the exact  
20 language in the statute. Okay.

21 Then I propose to -- anybody have a problem  
22 with that? Then I propose to instruct on the Vermont  
23 statute and say the following:

24 Engaging in a sexual act with a child who is  
25 under the age of 16 is a crime in Vermont. A sexual act

1 under Vermont law means conduct between persons  
2 consisting of contact between the penis and the vulva,  
3 the mouth and the penis, and the mouth and the vulva.  
4 Yeah, means conduct between persons consisting of --  
5 okay. Because it would not be a crime under Vermont law  
6 for the defendant to engage in a sexual act with Harvey  
7 unless at that time she was under 16, you may not find  
8 the defendant guilty unless the government proves beyond  
9 a reasonable doubt that Harvey was -- Harvey was under  
10 16 when the defendant transported her from New Hampshire  
11 to Vermont.

12 Anybody have any issue with that?

13 MR. SAXE: Nope.

14 THE COURT: Okay. Intention:

15 A defendant acts with an intention that a  
16 person will engage in sexual activity for which any  
17 person could be prosecuted if he acts voluntarily with  
18 the specific intention that the person transported will  
19 engage in sexual activity for which any person could be  
20 prosecuted. The United States does not need to prove  
21 that the defendant's sole reason for transporting  
22 Mackenzie Harvey from New Hampshire to Vermont was for  
23 the purpose that she would engage in sexual activity --  
24 I might rephrase that slightly. A person may have  
25 several different purposes or motives for such

1 transportation. The government must prove beyond a  
2 reasonable doubt, however, that at least one of the  
3 defendant's substantial motivations was for Harvey to  
4 engage in sexual activity.

5 That's what I've got on intention. I should  
6 have something in the discussion about -- let me think.  
7 Does the government want me to put in something dealing  
8 with the issue of consent? So, I think I've had an  
9 earlier version of this, some word about consent not  
10 being a defense. I think I need to add something like  
11 that. I'll work on something over the weekend but  
12 something that will be to the effect that a consent by  
13 the child is not a defense to a charge under Vermont law  
14 of having engaging in a sexual act with a child under  
15 age 16, something like that.

16 MR. AFRAME: I was going to make a writing  
17 suggestion, but --

18 THE COURT: Go ahead.

19 MR. AFRAME: I think it could go engaging in a  
20 sexual act with a child who is under the age of 16 is a  
21 crime in Vermont regardless of whether --

22 THE COURT: Regardless of whether the child  
23 consents or not, yeah, I think that's right. Okay, so  
24 I'm going to add after the word Vermont:

25 Regardless of whether the child consents to



1 the sexual act. Okay.

2 And I've given intention. And that's  
3 basically what I think we need to instruct on. Do you  
4 have different thoughts? Given your client's testimony  
5 I think a lot of potential argument that you have has  
6 gone out the window. It's always now it becomes a do  
7 you believe him or not case. So, I don't think we need  
8 to do anything else.

9 Do you have other specific instructions in  
10 mind as you sit here now, understanding that you might  
11 have some supplemental --

12 MR. SAXE: I don't think so.

13 THE COURT: No? Okay, do you have anything  
14 else?

15 MR. AFRAME: No.

16 THE COURT: The rest of it will be the  
17 boilerplate. Of course you should go over it. I will  
18 go over it. I may strike certain things like sometimes  
19 I have in there if an expert witness testifies when  
20 there really wasn't an expert opinion witness, things  
21 like that to the extent there is some testimony here,  
22 some instruction that doesn't have any bearing on what  
23 happened in the case, I may strike it. I may clean up  
24 grammatical errors and things because it's put together  
25 quickly by my assistant. But other than that I think

